IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 261 of 2007

With

CIVIL APPLICATION No. 9375 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

==========

1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

==========

TAPAN JOSHI & 3 - Appellant(s)
Versus
EINFOCHIPS LTD. - Respondent(s)

==========

Appearance :
K.S. Nanavati, Sr.Advocate with Navin Pahwa, advocate for M/S THAKKAR ASSOC.for Appellants:1-4
Mr.Mihir Thakore, Sr.Advocate with Chhatrapati, advocate for SINGHI & CO for Respondent:1

==========

CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 18/07/2007

ORAL JUDGMENT

1. Rule. Learned counsel waives service of notice of Rule on behalf of Singhi & Co.

2. The present Appeal From Order has been preferred by original defendants against the order passed by learned City Civil Court, Ahmedabad dated 10th July, 2007 upon injunction application,-below Exh.5 in Civil Suit No.1494 of 2007 preferred by the respondent (original plaintiff).

3. Having heard the learned counsel for both the sides and looking to the facts and circumstances of the case, I hereby quash and set aside the order passed by learned City Civil Court, Ahmedabad dated 10th July, 2007 below Exh.5 in Civil Suit No.1494 of 2007 mainly for the following reasons.

2.1 It appears, from the facts of the case, that mandatory injunction order has been passed by the Trial Court as per Order XXXIX Rule 3 of the Code of Civil Procedure, 1908. No notice has been given to the present appellants (original defendants).

No reasons have been recorded for grant of mandatory injunction in terms of prayers granted as per Para:10(a) and 10(b) of the Notice of Motion. Prayers 10(a) and 10(b) read as under:-

> " **10 (a):-** Pending the hearing and final disposal of the present suit, the Hon'ble Court be pleased to grant a temporary injunction restraining the defendants, their servants, agents, representatives associates, successors, assignees, or any other persons claiming through them from employing, working with, catering to, soliciting encouraging or cause others to solicit or encourage any employees, contractors or customers of the plaintiff to terminate their employment, contract or relationship with the plaintiff."
>
> **" 10 (b):-** Pending the hearing and final disposal of the present suit, the Hon'ble Court be pleased to grant a temporary injunction restraining the defendants, their servants, agents, representatives associates, successors, assignees, or any other persons claiming through them from employing or continuing in employment the former employees/ consultants of the Plaintiff."

2.2 It also appears from the facts of the case that certain employees of the original plaintiff have left the job and they joined original defendant no.4 company. It is vehemently submitted by the learned counsel for the respondent (original plaintiff) that if the original defendant nos.1, 2 and 3 are soliciting the employees of the original plaintiff, it will cause irreparable loss to the plaintiff, and, therefore, mandatory prayer was prayed and Stay as prayed for was granted.

4. Looking to the facts of the case, this contention is not accepted by this Court. The five employees who joined the services of the original plaintiff had given Notice, enough in advance. The notices were given in the month of June, 2007. Thus, the original plaintiff was much aware about the intention of their own employees. They joined original defendant no.4 on 30th June, 2007 and in July,2007. The suit was filed on 10th July, 2007.

5. Looking to the facts of the case, it appears that

no reasons have been given in the impugned order in granting ad-interim mandatory injunction as per 10(A) and 10(B). These five employees were not even joined as party defendants. Relief granted is having an effect of termination of services by the defendant no.4 company. No reasons have been given by the trial court for its opinion that the object of granting the injunction would be defeated by delay. Before the grant of such an interim relief, the reasons ought to have been granted as per proviso to Order XXXIX Rule 3 of the Code of Civil Procedure, 1908 by the Trial Court as no notice was given to the defendants. This is imperative in nature and not optional. Even some of the defendants were not joined as party to the suit.

6. Looking to the reasons given in the impugned order, it also appears that no reasons have been assigned for grant of Prayer 10(A) and 10(B) as prayed in application below Exh.5 in the suit or Notice of Motion in the suit.

7. It is also not certain who solicited whom. Whether the employees were totally dissatisfied with the

original plaintiff or not. The servicemen has got several dissatisfaction with the service. Soliciting the employees is an allegation. Ad-interim relief has been granted without issuing notice to the respondent. Looking to the Code of Civil Procedure especially Order XXXIX Rule 3, before granting such relief without notice, Court must record the reasons for its opinion that object of granting the injunction would be defeated by delay. As stated hereinabove, two employees had joined the services on 30th June, 2007, others in the month of July, 2008, enough in advance notices were given in the month of June, 2007. Plaintiff was knowing that their employees are going away.

8. Both the counsel cited several judgments before this Court. Only few of them are referred so as not to make bulky this judgment.

9. Learned counsel appearing for the appellants has relied upon the decision rendered by the Hon'ble Supreme Court reported in (1993) 3 SCC 162, more particularly Paras:33 and 34, which read as under:-

" **PARA:33-** It has come to our notice that in

spite of the aforesaid statutory requirement, the courts have been passing orders of injunction before issuance of notices or hearing the parties against whom such orders are to operate without recording the reasons for passing such orders. It is said that if the reasons for grant of injunction are mentioned, a grievance can be made by the other side that court has prejudged the issues involved in the suit. According to us, this is a misconception about the nature and the scope of interim orders. It need not be pointed out that any opinion expressed in connection with an interlocutory application has no bearing and shall not affect any party, at the stage of the final adjudication. Apart from that now in view of the proviso to Rule 3 aforesaid, there is no scope for any argument. When the statute itself requires reasons to be recorded, the court cannot ignore that requirement by saying that if reasons are recorded, it may amount to expressing an opinion in favour of the plaintiff before hearing the defendant."

"PARA:34- The imperative nature of the proviso has to be judged in the context of Rule 3 Order 39 of the Code. Before the proviso aforesaid was introduced, Rule 3 said "the court shall in all cases, except where it appears that the object of granting the injunction would be defeated by the delay, before granting an injunction, direct

notice of the application for the same to be given to the opposite-party". The proviso was introduced to provide a condition, where court proposes to grant an injunction without giving notice of the application to the opposite-party, being of the opinion that the object of granting injunction itself shall be defeated by delay. The condition so introduced is that the court "shall record the reasons" why an ex parte order of injunction was being passed in the facts and circumstances of a particular case. In this background, the requirement for recording the reasons for grant of ex parte injunction, cannot be held held to be a mere formality. This requirement is consistent with the principle, that a party to a suit, who is being restrained from exercising a right which such party claims to exercise either under a statute or under the common law, must be informed why instead of following the requirement of Rule 3, the procedure prescribed under the proviso has been followed. The party which invokes the jurisdiction of the court for grant of an order of restraint against a party, without affording an opportunity to him of being heard, must satisfy the court about the gravity of the situation and court has to consider briefly these factors in the ex parte order. We are quite conscious of the fact that there are other statutes which contain similar provisions requiring the

court of the authority concerned to record reasons before exercising power vested in them. In respect of some of such provisions it has been held that they are required to be complied with but non-compliance therewith will not vitiate the order so passed. But same cannot be said in respect of the proviso to Rule 3 of Order 39. The Parliament has prescribed a particular procedure for passing of an order of injunction without notice to the other side, under exceptional circumstances. Such ex parte orders have far-reaching effect, as such a condition has been imposed that court must record reasons before passing such order. It it is held that the compliance with the proviso aforesaid is optional and not obligatory, then the introduction of the proviso by the Parliament shall be a futile exercise and that part of Rule 3 will be a surplusage for all practical purposes. Proviso to Rule 3 of Order 39 of the Code, attracts the principle, that if a statute requires a thing to be done in a particular manner, it should be done in that manner or not all. This principle was approved and accepted in well-known cases of ***Taylor V. Taylor and Nazir Nazir Ahmed v. Emperor.*** This Court has also expressed the same view in respect of procedural requirement of the Bombay Tenancy and Agricultural Lands Act in the case of ***Ramchandra Keshav Adke V. Govind Joti Chavare."*** **(Emphasis**

Supplied)

Thus, it is clear that as per proviso to Rule 3 of Order XXXIX, reasons ought to have been recorded for grant on ex-parte relief. Looking to the impugned order no reasons have been given for grant of ex-parte order. It has also stated in Para-35 of the aforesaid judgment that not only reasons for grant of injunction should be given, but also how the object of granting injunction shall defeat if an ex-parte order is not passed. No such satisfaction has been stated or is revealed from the impugned order.

10. Learned counsel for the respondent has also relied upon the decision rendered by the Hon'ble Supreme Court ***(2004) 4 SCC 696, 1990 (Supp) SCC 727 and AIR 1982 Gujarat 264.***

11. Learned counsel for the respondent (original plaintiff) submitted that for the breach of injunction granted as per Para-10(B) of Exh.5 application, they will not initiate any contempt proceedings.

12. The aforesaid authorities are not much helpful to the original plaintiff which says that if need arise, the Trial Court can use the discretion and so far as proposition of law is concerned, this Court accepts the proposition but looking to proviso to Rule 3 of Order XXXIX if the injunction is to be given without notice, the Trial Court must record the reasons. In the facts stated hereinabove, no such satisfaction or reason is being reveled from the impugned order. Otherwise also, the employees have joined with the defendant no.4 company, they are not joined defendants in the suit and the order has been obtained against them. So far as defendant nos.1, 2 and 3 are concerned, they had also given resignation from April, 2007 and they left services in the month of May and June, 2007. There are bare allegations as to the effect that the defendants are soliciting customers and contractors. Not a single incident has been narrated that the defendant nos.1, 2 and 3 have been solicited or contacted which customers or contractors of original plaintiff nor any such factual aspect is given to this Court in this Appeal at the time of argument. Under this situation also, the Trial Court's order deserves to

be quashed and set aside. As the matter is pending before the Trial Court, this Court has not much analysing the facts, but, suffice, it to say that there are no reasons recorded by the Trial Court as required under proviso to Rule 3 Order XXXIX of Code of Civil Procedure, 1908 and in the aforesaid background of the facts, I hereby quash and set aside the order dated 10th July, 2007 passed by the Trial Court below Exh.5 in Notice of Motion in Civil Suit No.1494 of 2007.

13. Rule is made absolute to the aforesaid extent. Appeal From Order is disposed of accordingly.

14. In view of the above order, Civil Application does not survive and hence, the same is disposed of accordingly.

(***D.N.PATEL, J.***)

Amit/-